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To (B) Or Not to (B): The Future of Aider and Abettor Liability in South Carolina

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TO (B) OR NOT TO (B): THE FUTURE OF AIDER AND ABETTOR LIABILITY IN SOUTH CAROLINA

I. INTRODUCTION

Liability for another's wrongdoing is not a new concept to the law.[1] The Bible recognized that it was wrong to help another commit wrong,[2] and this principle appeared in English law as early as the seventeenth century.[3] Eventually the principle came into this country as the doctrine of vicarious liability for concerted action.[4] Extended somewhat, the principle now includes liability for aiding and abetting another's tortious conduct.[5]

Aiding and abetting a tort has been a viable cause of action in American courts since at least 1850,[6] and the legislature codified aiding and abetting as

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1. *See* Act of Mar. 4, 1909, Pub. L. No. 350, ch. 321, § 322, 35 Stat. 1088, 1150 (imposing liability as a principal on those who aid and abet trespass and robbery); Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994) (stating "[a]iding and abetting is an ancient criminal law doctrine"); Sir John Heydon's Case, 77 Eng. Rep. 1150, 1151 (K.B. 1613) (imposing joint liability on all who come together to commit the trespass of battery).

2. *See Proverbs* 1:10-19.

3. *See* Clark v. Newsam, 154 Eng. Rep. 55, 57, 59 (Ex. 1847) (recognizing joint liability for false imprisonment where only one of two defendants signed a charge-sheet); Matthews v. Coal, 79 Eng. Rep. 329, 329 (Ex. Ch. 1616) (affirming a joint damage award against three defendants found guilty of one battery). These early cases are not aiding and abetting cases, but rather are based on the concerted action theory found in the Restatement of Torts. *See* RESTATEMENT (SECOND) OF TORTS § 876(a) (1979).

4. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 322 (5th ed. 1984); *see also* Brown v. Perkins, 83 Mass. (1 Allen) 89, 98 (1861) (holding that defendants could be held liable as principals for aiding and abetting by their presence at the trespass and encouragement and excitement of the wrongful conduct).

5. *See* KEETON ET AL., *supra* note 4, at 323 & n.7.

6. *See* Bird v. Lynn, 49 Ky. (10 B. Mon.) 422, 423 (1850) (stating that a claim for an aiding and abetting trespass, assault and battery would lie where defendant's words encouraged the principal's conduct and the words were directly related to the conduct); *see also Perkins*, 83 Mass. (1 Allen), at 98:

> [A]ny person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal.

Id.

The Restatement (Second) of Torts summarizes the elements of common law aiding and abetting liability. RESTATEMENT (SECOND) OF TORTS § 876 (1979). That section provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or

a criminal offense as early as 1909.[7] Unfortunately, a long history does not necessarily provide a clear history.[8] The Supreme Court has noted that the doctrine surfaces most often in statutory securities cases, and its application has been uncertain, based largely on limited common law precedent.[9]

South Carolina finds aiding and abetting in its common law as well,[10] but its application has been similarly limited.[11] However, this history does not suggest that aiding and abetting is not viable in South Carolina; to the contrary, "[a]ider and abettor liability is alive and well in South Carolina."[12]

This Comment explores common law aiding and abetting liability, paying particular attention to its past and future effects on South Carolina law. Part II examines the limited history of South Carolina's aiding and abetting liability

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> pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Id.

7. *See* Act of Mar. 4, 1909, Pub. L. No. 350, ch. 321, § 322, 35 Stat. 1088, 1150; Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994).

8. *See* KEETON ET AL., *supra* note 4, at 322 ("An examination of the multitude of cases in which [theories of joint tort and joint tortfeasors] . . . are to be found leads to the conclusion that [these theories] . . . have meant very different things to different courts, and often to the same court . . . .").

9. *Central Bank*, 511 U.S. at 181 (referencing Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983)). The evolution of aiding and abetting liability under section 876(b) of the Restatement (Second) of Torts is interesting. When the federal courts began adopting elements for aiding and abetting securities law violations, aiding and abetting was hardly a well-developed doctrine at common law. *See Central Bank*, 511 U.S. at 181. The federal courts used section 876(b)'s requirements for almost 20 years before deciding, in *Central Bank,* that no private aiding and abetting cause of action existed under the statute. *See id.* at 191. Now state courts are left to struggle with section 876(b) using statutory interpretations loosely based on an under-developed common law doctrine.

10. *See* Atlanta Skin & Cancer Clinic v. Hallmark Gen. Partners, Inc., No. 91-CP-23-3958, slip op. at 6 (S.C. Ct. of Common Pleas Feb. 24, 1994) ("South Carolina has long recognized aider and abettor liability."), *rev'd in part, aff'd in part*, 320 S.C. 113, 121, 463 S.E.2d 600, 605 (1995) (holding no implied cause of action for aiding and abetting securities statute exists except for the remedy provided by § 35-1-1500 of the South Carolina Code and stating that the court did not submit the case to the jury on common law aiding and abetting theory); *see also* Singleton v. Hughes, 245 S.C. 169, 139 S.E.2d 747 (1965) (recognizing that passenger injured in automobile wreck would be barred from recovery by contributory negligence if jury found that automobile was involved in a race at the time of the accident because passengers in racing automobiles are liable for injuries resulting therefrom).

11. *See Atlanta Skin & Cancer Clinic,* No. 91-CP-23-3958, slip op. at 8 ("[O]ur court has held in at least three cases that aiding and abetting liability exists for negligence, breach of fiduciary duty, and abuse of process."). Since then, only one other case involving aiding and abetting a tort has been reported in South Carolina. *See* Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996).

12. John Freeman, *The Lying Client,* S. C. LAW., Nov.-Dec. 1998, at 10.

doctrine to elucidate where the state stands today. Part III looks at how the *Restatement's*[13] formulation of the aider and abettor liability doctrine has fared in other jurisdictions, and discusses some of the policy arguments surrounding interpretation of the elements of the tort. Part IV suggests a path that South Carolina should follow as the courts begin to establish a more complete precedent in this area and examines some new uses for this old form of liability.

II. AIDER AND ABETTOR LIABILITY IN SOUTH CAROLINA

A. Pruitt v. Bowers

In April of 1998, the South Carolina Court of Appeals, recognizing that this state had not yet substantially addressed liability for aiders and abettors under *Restatement (Second) of Torts* section 876(b)[14] remanded *Pruitt v. Bowers*[15] for the trial court to consider whether South Carolina should accept the *Restatement's* version of aider and abettor liability.[16]

Pruitt arose out of an automobile accident in which Ms. Pruitt suffered injuries when an intoxicated Mr. Bowers, driving thirty miles an hour over the speed limit, ran a red light and struck Pruitt's car.[17] There were two passengers in Bowers's car, Mr. Poore and Mr. Werts.[18] Poore and Bowers smoked marijuana earlier in the day and later all three went to a lake to drink beer.[19] Bowers drove, and Poore and Werts offered to pay for gas.[20] While at the lake, Bowers drank twelve beers in one-and-a-half hours and became too intoxicated to drive—a fact which Poore knew.[21] Initially, on the trip home, Werts drove Bowers's car at Poore's and Bowers's request.[22] However, at some point Bowers began driving because Werts was not driving well.[23] While Bowers drove, Poore slept in the back seat and was still asleep at the time of the accident.[24]

Pruitt sued all three men. The trial court granted Poore's motion for summary judgment on the claim of joint enterprise liability.[25] At the same time, however, the judge granted Pruitt's motion to amend her complaint to include

13. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).
14. *See id.*
15. 330 S.C. 483, 488-89, 499 S.E.2d 250, 253 (Ct. App. 1998).
16. *Id.*
17. *Id.* at 486, 499 S.E.2d at 252.
18. *Id.* at 485, 499 S.E.2d at 251.
19. *Id.* at 485, 499 S.E.2d at 252.
20. *Id.* at 485, 499 S.E.2d at 251.
21. *Id.* at 485, 499 S.E.2d at 252.
22. *Id.*
23. *Id.* at 486, 499 S.E.2d at 252.
24. *Id.*
25. *Id.* at 485, 499 S.E.2d at 251.

causes of action under 876(b) and civil conspiracy.[26] The court of appeals affirmed the trial court on both counts and remanded the case for consideration of the amended complaint.[27]

Discussing Pruitt's motion to amend her complaint, the court stated that it "elect[ed] not to entertain Poore's appeal because of the novelty of the theory of liability" in 876(b).[28] Presumably, the court of appeals believed that South Carolina courts had not yet addressed 876(b) thoroughly enough to qualify as precedent.

B. A Passing Glance: The Court's First Look at Section 876(b)

Section 876(b) did appear in one South Carolina case before *Pruitt.* The supreme court addressed an 876(b) claim in *Future Group, II v. Nationsbank*[29] but ruled against the plaintiff on that cause of action.[30] In *Future Group II,* a preferred shareholder and a creditor sued Nationsbank, claiming that the bank's refinancing of corporate debt aided and abetted the corporate director's breach of fiduciary duty.[31] The refinancing was a breach of the director's fiduciary duty because the refinancing constituted a "corporate guarantee of a director's debt" without shareholder or creditor approval as required by the by-laws and by the credit agreement.[32]

The court relied on 876(b) as well as aiding and abetting cases from other jurisdictions to find that the bank was not liable for aiding and abetting the director's breach.[33] The court stated the elements of the claim to be: "(1) a breach of a fiduciary duty owed to the plaintiff (2) the defendant's knowing participation in the breach and (3) damages."[34] Relying heavily on the requirement of "the defendant's knowing participation in the [fiduciary's] breach,"[35] the court found that the bank did not have actual knowledge that the refinancing required shareholder approval.[36] Although the actual knowledge requirement appeared in *Future Group II,* it is not entirely clear that the court would require strict actual knowledge in all cases. Implying that something less may suffice, the court noted that the transaction met the statutory requirement

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26. *Id.*
27. *Id.*
28. *Id.* at 488, 499 S.E.2d at 253.
29. 324 S.C. 89, 100, 478 S.E.2d 45, 50 (1996).
30. *Id.*
31. *Id.* at 95, 478 S.E.2d at 48.
32. *Id.* at 98-99, 478 S.E.2d at 50.
33. *Id.* at 99, 478 S.E.2d at 50 (citing Samuel M. Feinberg Testamentary Trust v. Carter, 652 F. Supp. 1066 (S.D.N.Y. 1987); Holmes v. Young, 885 P.2d 305 (Colo. Ct. App. 1988); Spinner v. Nutt, 631 N.E.2d 542 (Mass. 1994); Blow v. Shaughnessy, 364 S.E.2d 444 (N.C. 1988)).
34. *Future Group, II,* 324 S.C. at 99, 478 S.E.2d at 50 (citing *Holmes,* 885 P.2d at 308-09).
35. *Id.*
36. *Id.*

of either majority approval by the shareholders or approval by the board of directors.[37] Since the refinancing satisfied this requirement, it was not possible to infer that the bank knew that the transaction was in breach of the director's fiduciary duty.[38]

C. *Section 876(b) Alternatives: South Carolina's Experience With Other Civil Aider and Abettor Liability*

Although section 876(b), in particular, has not been adequately addressed, South Carolina is not without a history of imposing liability for aiding and abetting the wrongful act of another. However, the situation is not unlike the one lamented by the Circuit Court for the District of Columbia when it noted that "[p]recedent, except in the securities area, is largely confined to isolated acts of adolescents in rural society."[39] Two early cases, *Singleton v. Hughes*[40] and *Skipper v. Hartley*,[41] fall into this category.

In *Skipper* the South Carolina Supreme Court addressed for the first time whether a defendant passenger in vehicle A that was racing against vehicle B could be held liable for injuries caused to a third party passenger in vehicle C, which was not racing.[42] The court affirmed judgment against the defendant passenger, finding that "[a]ll who wilfully participate in speed competition between motor vehicles on a public highway are jointly and concurrently negligent and, if damage to one not involved in the race proximately results from it, all participants are liable, regardless of which of the racing cars actually inflicts the injury."[43]

Two years later, the court recognized this concept of aider and abettor liability when it applied the rule used in *Skipper* to slightly different facts.[44] In *Singleton*, the plaintiff was the administrator of the deceased passenger's estate.[45] The defendant driver argued that the doctrine of contributory recklessness barred recovery by the plaintiff because the deceased passenger was "participating, aiding and abetting in an automobile race."[46] Accepting this statement of the law, the court nevertheless upheld the jury verdict for the plaintiff because the plaintiff presented sufficient evidence to establish that the

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37. *Id.*

38. *Id.* The board of directors had in fact signed a corporate resolution stating that the transaction was in the best interests of the corporation. *Id.* at 98, 478 S.E.2d at 50. South Carolina has yet to create a definitive standard for aider and abettor liability under 876(b). Parts III and IV of this Comment examine the scienter requirement.

39. Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983).

40. 245 S.C. 169, 171, 139 S.E.2d 747, 748 (1965).

41. 242 S.C. 221, 222-23, 130 S.E.2d 486, 487 (1963).

42. *Id.* at 224, 130 S.E.2d at 488.

43. *Id.* at 226, 130 S.E.2d 488-89 (quoting Boykin v. Bennett, 118 S.E.2d 12, 17 (N.C. 1961)).

44. *See Singleton*, 245 S.C. at 171, 139 S.E.2d at 748.

45. *Id.*

46. *Id.*

race had ended by the time of the accident.[47]

Later, South Carolina extended aider and abettor liability beyond these limited racing situations and recognized a cause of action for aiding and abetting a breach of fiduciary duty and abuse of process. In *Lowndes Products, Inc. v. Brower*,[48] the South Carolina Supreme Court found the defendants liable for assisting the financing of a new company started by the plaintiff's former employees. According to the court, the defendants were liable for aiding and abetting the employees' breach of fiduciary duty to their former employer.[49] In so finding, the court stated that "a person who without privilege knowingly causes an agent to abandon his duties, or otherwise aids or assists him to violate a duty to his principal is subject to tort liability to the principal."[50] While this language relates to duties between principals and agents, the court went on to apply a test strikingly similar to section 876(b).[51] Applying the test, the court found that a breach by the employees injured the plaintiff, the defendants knowingly cooperated with the employees, and the defendants helped to further the employees' disloyalty.[52]

The supreme court used an aiding and abetting theory again a few years later to hold a defendant liable for aiding and abetting abuse of process in *Broadmoor Apartments of Charleston v. Horwitz*.[53] The court stated that "[a]s a general rule, liability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse."[54] In that case, aiding and abetting liability attached when defendant Schlopy helped a third party file a lis pendens notice despite knowing that the third party's asserted rights were not valid.[55] Additionally, Schlopy filed a supporting affidavit containing statements he knew to be untrue.[56]

As illustrated by case law, aiding and abetting liability for common law torts is not without precedent in South Carolina, but the state law in this area is far from settled. Having not yet explicitly adopted 876(b), the courts of the state stand at a point where they can choose their course. Obviously, aider and abettor liability has the potential to be incredibly broad—punishing unwary,

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47. *Id.* at 178, 139 S.E.2d at 752.

48. 259 S.C. 322, 191 S.E.2d 761 (1972).

49. *Id.* at 337-38, 191 S.E.2d at 769-70.

50. *Id.* at 337, 191 S.E.2d at 769 (quoting 3 AM. JUR. 2D *Agency* § 290 (1994)).

51. *See* RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) (stating that one is liable if he "knows that another's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . .").

52. *Lowndes*, 259 S.C. at 337, 191 S.E.2d at 769.

53. 306 S.C. 482, 413 S.E.2d 9 (1991).

54. *Id.* at 486, 413 S.E.2d at 11 (citing 1 AM. JUR. 2D *Abuse of Process* § 17 (1994); 72 C.J.S. *Process* § 112 (1987)).

55. *Id.* at 487, 413 S.E.2d at 12.

56. *Id.*

faultless parties[57] and thereby making it difficult for small businesses to get professional advice.[58] At the same time, properly construed and applied, an aider and abettor cause of action can be very useful—giving plaintiffs something closer to full compensation, deterring parties from getting involved on the fringes of wrongful activity, and punishing accomplices who bury their head in the sand to avoid seeing the wrongful conduct.[59] These policy arguments are explored further in Part IV of this Comment after a more complete discussion of how other jurisdictions have addressed Restatement section 876(b).

III. SECTION 876(b): AN ELEMENTAL ANALYSIS

A. A Word of Caution

If South Carolina is to embrace 876(b) and allow qualified plaintiffs to recover from aiders and abettors, a few issues need to be addressed so that the courts do not find themselves muddled in confusing authority from other jurisdictions.[60] By addressing these issues, South Carolina can find a workable standard in the beginning and avoid uncertainty and backtracking in the future.

The first issue involves the difference between "(1) *conspiracy, or concerted action by agreement* [discussed in 876(a)], and (2) *aiding-abetting, or concerted action by substantial assistance* [found in 876(b)]."[61] The potential exists for courts to blur these two distinct subsections into one big mess.[62] The differences are important to maintain where both subsections could apply so that the court can determine whether the plaintiff has established one cause of action, instead of parts of each but not a whole of either.[63]

B. Requirements for an 876(b) Cause of Action

The *Restatement* identifies the elements of a cause of action for aiding and

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57. *See* William H. Kuehnle, *Secondary Liability Under the Federal Securities Laws—Aiding and Abetting, Conspiracy, Controlling Person, and Agency: Common-Law Principles and the Statutory Scheme*, 14 J. CORP. L. 313, 324 (1988); Stanley Pietrusiak, Jr., Comment, *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST. MARY'S L.J. 213, 238 (1996).

58. *See* Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 189 (1994) (noting the ripple effects that excessive aider and abettor liability may have).

59. *See id.* at 188.

60. *See id.* at 181 (stating that aiding and abetting doctrine under 876(b) has had uncertain application).

61. Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983). *But see* Granewich v. Harding, 985 P.2d 788, 792 (Or. 1999) (stating that conspiracy and aiding and abetting are not separate theories of recovery but instead are "two of several ways in which a person may become jointly liable for another's tortious conduct").

62. *See Halberstam*, 705 F.2d at 478.

63. *See id.*

abetting a tort, but it is vague as to exactly how those elements apply in a real case. The *Restatement* states that "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."[64]

Section 876(b) has frequently been broken down into the following requirements: (1) a wrongful act by the primary tortfeasor that results in injury to the plaintiff, (2) defendant's knowledge of the wrongful act, and (3) defendant's substantial assistance to the primary violator in the commission of the wrongful act.[65] Aiding and abetting liability, when established by these three elements, holds a defendant liable for all of the foreseeable consequences of the assisted conduct.[66]

The following sections address some of the issues that arise in defining the latter two requirements—requirements which have given courts the most trouble over the years.[67] Some courts analyze these two elements separately; others treat them as interrelated.[68]

1. Defendant's Knowledge of Breach by Primary Wrongdoer

The *Restatement* summarizes that the defendant must know that the primary wrongdoer has breached a duty, but it does not make clear whether actual or constructive knowledge will suffice.[69] As a result, courts applying the

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64. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

65. *See Halberstam*, 705 F.2d at 477; Holmes v. Young, 885 P.2d 305, 308-09 (Colo. Ct. App. 1994); Blow v. Shaughnessy, 364 S.E.2d 444, 447 (N.C. Ct. App. 1988) (adopting requirements from federal securities actions); Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting by Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 18 (1993).

66. *See Halberstam*, 705 F.2d at 488; American Family Mutual Ins. Co. v. Grim, 440 P.2d 621, 625 (Kan. 1968) (finding that a boy who aided and abetted others in breaking into a church to steal drinks to also be liable for the foreseeable fire damage caused when one of the torches used by the others to see while inside the church accidentally set fire to the attic, even though the defendant had not been in the attic or used a torch); RESTATEMENT (SECOND) OF TORTS § 876, cmt. d, illus. 10 (1979) (stating that one who aids and abets a burglary may also be liable where the primary wrongdoers sets fire to the scene to conceal the offense). However, the liability for foreseeable conduct is limited to liability for those acts done that are related to the assisted act. For example, an aider and abettor liable for assisting another's trespass is not liable for damages caused when the primary wrongdoer also intentionally sets fire to the landowner's house. *See id.* at illus. 11.

67. *See, e.g.*, Kuehnle, *supra* note 57, at 322 (arguing knowledge is the most controversial requirement); McNulty & Hanson, *supra* note 65, at 19 (1993) (noting assistance is the key element).

68. *See* Witzman v. Lehrman, Lehrman, & Flom, 601 N.W.2d 179, 188 (Minn. 1999) (recognizing that the knowledge and assistance elements are interrelated); Future Group, II v. Nationsbank, 324 S.C. 89, 100, 478 S.E.2d 45, 50 (treating elements separately).

69. *See* RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

Restatement have used both standards.[70] Constructive knowledge, as used in this Comment, means that the defendant has either acted recklessly in not knowing of the breach or that the circumstances warrant an inference that he knew of the breach.[71] Circumstantial evidence may provide the necessary proof to infer the defendant's knowledge.[72]

Courts addressing the knowledge requirement independent of 876(b) have often been hesitant to specifically define the knowledge element.[73] The United States Supreme Court has suggested that 876(b) is analogous to criminal aiding and abetting.[74] Some lower courts have interpreted this statement to require "some knowledge" to prove actual knowledge.[75] This guidance is not particularly useful as it again fails to define what will constitute knowledge.

Thus far, South Carolina, examining the knowledge element separately from the assistance element, seems to be leaning towards the requirement of strict actual knowledge. However, the courts have made no unequivocal statement of the standard. The supreme court required actual knowledge in both *Future Group II* and *Lowndes*, but in neither case did the court explicitly state actual knowledge to be a prerequisite to recovery.[76] Furthermore, in *Future*

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70. *See, e.g.*, Kolbeck v. LIT Am., Inc., 939 F. Supp. 240, 246 (S.D.N.Y. 1996) (reciting that New York common law requires actual knowledge); Diduck v. Kaszycki & Sons Contractors Inc., 974 F.2d 270, 283 (2d Cir. 1992) (requiring only constructive knowledge) *modified*, Mertens v. Hewitt Assocs., 508 U.S. 248 (1993); Terrydale Liquidating Trust v. Barness, 611 F. Supp. 1006, 1030 (S.D.N.Y. 1984) (requiring actual knowledge). *Mertens* supplanted *Diduck* to the extent that it limited plaintiff's relief to equitable remedies for claims of aiding and abetting breach of fiduciary duty under ERISA. *Mertens*, 508 U.S. at 262. *See also* Gruby v. Brady, 838 F. Supp. 820, 835 (S.D.N.Y. 1993). However, the standard of constructive knowledge remains intact. *See* Liss v. Smith, 991 F. Supp. 278, 306 (S.D.N.Y. 1998).

71. *See Halberstam*, 705 F.2d at 486 (finding that defendant's knowledge of primary wrongdoer's conduct could be inferred by the evidence presented and noting that "it defies credulity that [defendant] Hamilton did not know that something illegal was afoot"); Kuehnle, *supra* note 57, at 327-28 (noting that recklessness is the standard in the majority of jurisdictions for securities law violations analyzed under 876(b)).

72. *See Halberstam*, 705 F.2d at 488 (holding that defendant could be held liable for aiding and abetting wrongful death without proof of actual knowledge but upon showing of evidence that would allow factfinder to infer knowledge); Aebischer v. Reidt, 704 P.2d 531, 533 (Or. Ct. App. 1985) (finding defendant liable for aiding and abetting negligence of driver because evidence suggested that defendant should have known providing driver with marijuana would impair his ability to drive).

73. *See, e.g.*, Holmes v. Young, 885 P.2d 305, 310 (Colo. Ct. App. 1994) (stating that the court did not need to decide if actual or constructive knowledge was sufficient to establish liability because both standards were supported by the evidence).

74. *See* Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994).

75. *Kolbeck*, 939 F. Supp. at 247 (citing United States v. Giraldo, 80 F.3d 667, 676 (2d Cir. 1996)).

76. *See* Lowndes Prod., Inc. v. Brower, 259 S.C. 322, 337, 191 S.E.2d 761, 769 (1972) (finding, without reference to 876(b), that actual knowledge existed since defendant "knowingly cooperated with" the primary tortfeasors, but not stating that actual knowledge was required); Future Group, II v. Nationsbank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996) (finding no liability for defendant for aiding and abetting because of his lack of actual knowledge).

Group II, the court hinted that constructive knowledge may suffice under different facts.[77] Thus, it appears that the general question of what constitutes knowledge remains unresolved.

South Carolina should not adopt the severely limited and problematic standard of actual knowledge.[78] Defendants who turn a blind eye and assist the obvious wrongdoings of another may not be liable. Further, an actual knowledge requirement would wipe out the deterrent value of aiding and abetting liability to the extent that potential aiders and abettors would have no reason (other than moral ones) to refuse to assist primary wrongdoers whose conduct is obviously tortious.[79] Additionally, South Carolina should reject actual knowledge as a standard because the courts requiring it often have to carve out exceptions in order to compensate for its inherent unfairness.[80] Exceptions only add to the existing complexity of the law and could have the undesired effect of inducing innocent defendants to settle to avoid trial.[81]

On the other hand, a negligence standard requiring less than recklessness or an inference of knowledge carries the risk of casting too wide a net.[82] Liability should not attach if the defendant aider and abettor merely failed to exercise due care to the plaintiff to whom he owed no duty to exercise such care.[83] Furthermore, a mere negligence standard could chill business relationships as it would require possible aiders and abettors to inquire too

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77. *See Future Group, II*, 324 S.C. at 99, 478 S.E.2d at 50 (noting that the director's breach was not obvious since the statutory requirement for the transaction was met). Therefore, it appears that if it had been more obvious (yet unknown to the defendant) that the primary violator's conduct was a breach (perhaps a direct violation of a statute), constructive knowledge may have sufficed.

78. *See* Kuehnle, *supra* note 57, at 324; Pietrusiak, *supra* note 57, at 236 (noting that "[t]he elusive nature of knowledge in legal contexts further confuses the issue").

79. Additionally, an actual knowledge requirement would make proof nearly impossible for aiding and abetting intangible torts since, short of an admission of knowledge by the defendant, there is not likely to be any conclusive evidence of his knowledge of the wrongdoing. *See* Kuehnle, *supra* note 57, at 322.

80. *See* Kuehnle, *supra* note 57, at 328-29. Kuehnle cites three general circumstances in which exceptions have been made: (1) when a fiduciary or other special relationship between plaintiff and aider and abettor exists, (2) where plaintiff has foreseeably relied on the defendant aider and abettor, and (3) where the defendant aider and abettor receives a benefit from the primary violator's act. The first exception seems unnecessary given that the plaintiff would not need to rely on aider and abettor liability if the defendant had a duty directly to the plaintiff. The usefulness of aiding and abetting liability is that it can hold a defendant liable for damages to a plaintiff without such a duty.

81. *See* Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 189 (1994). While less litigation may not seem undesirable, the true effect of increased settlements could be that professionals who provide much needed advice to businesses and individuals may become reluctant to provide such services in the face of potential liability.

82. *See* Camp v. Dema, 948 F.2d 455, 459 (8th Cir. 1991).

83. *See* McNulty & Hanson, *supra* note 65, at 22.

deeply into the conduct of those with whom they interact.[84]

Thus, neither actual knowledge nor failure to exercise due care as to knowledge is an appropriate standard. Constructive knowledge, including recklessness or inference of knowledge from the circumstances, is a reasonable middle ground standard. Constructive knowledge does not impose liability on professionals and others who, in the ordinary course of their business, inadvertently assist another's wrong. At the same time, a constructive knowledge standard would hold liable those who must have at least suspected that the deal with which they assisted was not entirely straight.

Using circumstantial evidence to warrant an inference of knowledge is appropriate given the impossibility, or at least extreme difficulty, in proving actual knowledge.[85] Recklessness is an appropriate standard because it seems only reasonable to hold aiding and abetting defendants civilly liable for conduct that could result in a criminal conviction.[86] The criminal standard for recklessness found in the Model Penal Code is as follows:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[87]

While it may be reasonable to define knowledge as recklessness or imputed knowledge, constructive knowledge does have its drawbacks. Given the circumstantial and subjective nature of a constructive knowledge standard, there will likely be further confusion about what constitutes knowledge as fact finders reach opposite conclusions under similar fact patterns. Clearly, this situation would be detrimental to the willingness of professionals to render advice because it would fail to give potential defendants adequate guidance about what may constitute aiding and abetting.

One answer to this problem is to resist bifurcation of the issues of knowledge and assistance by employing a sliding scale test that recognizes

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84. *See* Woodward v. Metro Bank of Dallas, 522 F.2d 84, 96 (5th Cir. 1975) (noting that knowledge need not be actual, but to avoid overreaching, there must be some awareness of primary wrongdoer's conduct on the part of the aider and abettor).

85. *See* Kuehnle, *supra* note 57, at 324; Pietrusiak, *supra* note 57, at 236.

86. *See* John P. Freeman & Nathan M. Crystal, *Scienter in Professional Liability Cases*, 42 S.C. L. REV. 783, 809 (1991) (noting that criminal liability requires recklessness, yet courts have required even more, a "showing of 'severe recklessness' or 'high conscious intent,'" from civil defendants).

87. MODEL PENAL CODE § 2.02(c) (1985).

their interdependence.[88] The crux of this test is the evaluation of the knowledge and assistance requirements "in tandem."[89] Where assistance is not clearly established, the plaintiff must present more conclusive proof of knowledge, and vice versa.[90] While this test originated in the well-developed context of aiding and abetting securities law violations,[91] courts addressing aiding and abetting tortious conduct have made use of it.[92]

In the sliding scale test, the requirements are largely dependent on the facts of each case—in particular on the "nature of [the] wrongdoing alleged."[93] A factual test such as this is appropriate given the wide variety of circumstances under which aider and abettor liability may arise. Plaintiffs have used the doctrine in claims for aiding and abetting, inter alia, breach of fiduciary duty,[94] negligence,[95] abuse of process,[96] wrongful death,[97] fraud,[98] products liability,[99] and battery.[100]

2. The Substantial Assistance Requirement: How Much is Enough?

Before a full evaluation of the sliding scale approach can be made, it is

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88. *See* Witzman v. Lehrman, Lehrman, & Flom, 601 N.W.2d 179, 188 (Minn. 1999) (citing *In re* TMJ Implants Prod. Liab. Litig., 113 F.3d 1484, 1495 (8th Cir. 1997) and Camp. v. Dema, 948 F.2d 455, 459 (8th Cir. 1991)).

89. *In re TMJ*, 113 F.3d at 1495.

90. *See* Stokes v. Lokken, 644 F.2d 779, 784 (8th Cir. 1981).

91. The standards for aiding and abetting federal securities law violations were largely taken from Restatement (Second) of Torts section 876(b) (1979). *See* McNulty & Hanson, *supra* note 64, at 23.

92. *See In re TMJ*, 113 F.3d at 1495; *Witzman*, 601 N.W.2d at 188. *See also* Halberstam v. Welch, 705 F.2d 472, 478 & n.8, 487-88 (D.C. Cir. 1983) (applying a similar approach without explicitly calling it a sliding scale). In *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975), the court altered the test to find that general awareness sufficed but required that the assistance be knowing. Obviously, if the assistance is knowing, the defendant knows of the breach.

93. Terrydale Liquidating Trust v. Barness, 611 F. Supp. 1006, 1030 (S.D.N.Y. 1984).

94. *See* Lawyers Title Ins. Corp. v. United Am. Bank of Memphis 21 F. Supp.2d 785 (W.D. Tenn. 1998); Kolbeck v. LIT Am., Inc., 939 F. Supp. 240, 242 (S.D.N.Y. 1996); Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270 (2d Cir. 1992); S & K Sales Co. v. Nike, Inc., 816 F.2d 843 (2d Cir. 1987); Holmes v. Young, 885 P.2d 305 (Colo. Ct. App. 1994); Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994); *Witzman*, 601 N.W.2d at 185; Blow v. Shaughnessy, 364 S.E.2d 444 (N.C. Ct. App. 1988); Granewich v. Harding, 985 P.2d 788 (Or. 1999); Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996).

95. *See* Aebischer v. Reidt, 704 P.2d 531 (Or. Ct. App. 1985); Pruitt v. Bowers, 330 S.C 483, 499 S.E.2d 250 (Ct. App. 1998).

96. *See* Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991).

97. *See Halberstam*, 705 F.2d at 472; Hough v. Hough, No. 25145, 1999 WL 412358 (W. Va. June 18, 1999).

98. *See* Department of Econ. Dev. v. Arthur Andersen & Co., 924 F. Supp. 449, 455 (S.D.N.Y. 1996); *In re* Consolidated Welfare Fund ERISA Litig., 856 F. Supp. 837 (S.D.N.Y. 1994); Curiale v. Peat, Marwick, Mitchell & Co., 630 N.Y.S.2d 996 (N.Y. App. Div. 1995).

99. *See In re* TMJ Implants Prod. Liab. Litig., 113 F.3d 1484, 1495 (8th Cir. 1997).

100. *See* Courtney v. Courtney, 413 S.E.2d 418 (W. Va. 1991).

necessary to address the remaining factor—substantial assistance. While knowledge is difficult to define, the substantial assistance element is even less settled.[101] The uncertainty about substantial assistance has been exacerbated by courts attempting to treat knowledge and assistance separately.

Substantial assistance is basically a requirement of proximate cause. The comment to 876(b) states, "[i]f the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act."[102]

This interpretation is obvious, yet necessary, especially in light of the fact that the aider and abettor need not intend harm to the plaintiff.[103] Negligent acts by the primary tortfeasor should not make another party whose alleged aid or encouragement was not a significant factor in the resulting harm liable. Although not specifically addressing 876(b), the South Carolina Supreme Court has required a similar element of proximate cause for aiding and abetting liability. In *Lowndes Products, Inc. v. Brower* the supreme court noted that without the defendant aider and abettor's help, the plaintiff may not have been harmed.[104]

While it is clear that proximate cause should be an element in any test for substantial assistance, that concept does not adequately define those acts of assistance or encouragement which trigger liability. Specifically, the concept does not address whether silence or inaction can be grounds for aider and abettor liability.

Some courts and commentators object to imposing aiding and abetting liability for silence or inaction where the defendant owes no duty to the plaintiff.[105] Two main reasons for this "deep-seated antipathy" to " liability for mere inaction" have been advanced by commentators: (1) the highly individualistic nature of the common law (for example, there is no duty for the

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101. *See Halberstam*, 705 F.2d at 481; McNulty & Hanson, *supra* note 65, at 19. *But see* Kuehnle, *supra* note 57, at 322 (arguing that the most difficult element to define is knowledge).

102. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979); *see, e.g.*, Kolbeck v. LIT Am., Inc., 939 F. Supp. 240, 249 (S.D.N.Y. 1996) (requiring that defendant's inaction must be proximate cause of plaintiff's injuries); Blow v. Shaughnessy, 364 S.E.2d 444, 447 (N.C. Ct. App. 1988) (stating "[f]ederal courts have construed the 'substantial assistance' requirement of aiding and abetting as a causation requirement").

103. *See* Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 282 (2d Cir. 1992) (applying no intent to harm necessary rule from *S & K Sales Co. v. Nike, Inc.* 816 F.2d 843 (2d Cir. 1987)); *S & K Sales*, 816 F.2d at 849 (stating bluntly that "the tort of participation in a fiduciary's breach of duty simply does not require proof of an intent to harm"). *See also* RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979) (noting that liability attaches for intentional harms as well as merely negligent acts).

104. 259 S.C. 322, 337, 191 S.E.2d 761, 769 (1972).

105. *See Kolbeck*, 939 F. Supp. at 247; First Fin. Sav. Bank v. Am. Bankers Ins., 696 FED. SEC. L. REP. 95 (E.D.N.C., July 5, 1990); McNulty & Hanson, *supra* note 65, at 17-21 (arguing that liability for inaction or silence should be replaced by liability if the defendant breaches a duty to disclose and noting that there is generally no duty for someone to act to protect another from harm).

person sitting on the dock to rescue the man drowning in front of him), and (2) the reluctance of courts to force people to be good samaritans.[106]

Courts have imposed liability absent a duty when the assistance provided was inaction, but in doing so the courts have generally required conscious intent to aid the wrongful act.[107] Thus, conscious intent can be viewed as an exception to the general rule that silence and inaction are not actionable. However, as with the exceptions created to avoid the harshness of the knowledge requirement, this exception would be easier to apply and more flexible if expressed as an element of the sliding scale approach. In other words, the level of assistance required should depend on the knowledge of the defendant.

The interplay between knowledge and assistance still does not provide much guidance as to what constitutes substantial assistance. In fact, using interdependence alone would simply create a circular test under which the court would say that knowledge depends on assistance and assistance depends on knowledge. No useful test would result.

Fortunately, courts have adopted a number of factors to address the substantial assistance element.[108] The comment to 876(b) sets forth five factors: "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind."[109] Courts have identified an additional factor for judging the substantiality of the assistance: duration of the assistance provided.[110]

The factors set forth above, when applied under the sliding scale approach, help to address the problems of liability for inaction and silence and the definition of the requisite knowledge. Again, the usefulness of fact-specific factors is clear considering the wide variety of instances in which aider and abettor liability can arise.[111]

The nature of the act factor helps to define the knowledge factor. Knowledge is easier to prove for physical torts than for non-physical torts.[112] Compare the defendant who aids and abets an assault by yelling "Kill him!"

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106. *See* McNulty & Hanson, *supra* note 65, at 21.

107. *See* Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985); Halberstam v. Welch, 705 F.2d 472, 485 & n.14 (D.C. Cir. 1983). *See generally* Woodward v. Metro Bank of Dallas, 522 F.2d 84, 96-97 (5th Cir. 1975) (providing a general background on the state of the law of liability for inaction and silence).

108. *See In re* TMJ Implants Prod. Liab. Litig., 113 F.3d 1484, 1495 (8th Cir. 1997); *Halberstam*, 705 F.2d at 483-84; Lawyers Title Ins. Corp. v. United Am. Bank of Memphis, 21 F. Supp.2d 785, 798-99 (W.D. Tenn. 1998); Courtney v. Courtney, 413 S.E.2d 418, 426 (W. Va. 1991).

109. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979).

110. *See Halberstam*, 705 F.2d at 484 *cited with approval in In re TMJ*, 113 F.3d at 1495.

111. *See supra* notes 94-100 and accompanying text.

112. *See* Kuehnle, *supra* note 57, at 322.

and "Hit him more!"[113] to the lawyer who drafts papers for his corporate client which are in breach of a duty to the client's fiduciary.[114] Obviously, in the former example, the nature of the act makes knowledge easy to establish while, in the latter example, the plaintiff may need a considerable amount of circumstantial evidence to prove knowledge.

The amount of assistance factor is interwoven with the knowledge requirement as well. The greater the amount of assistance, the more easily knowledge can be inferred. Likewise, if there is not evidence of actual knowledge and the assistance was minimal (as it may be if the defendant aided and abetted by participation in routine business activities), then there is likely no basis for imputing knowledge.[115]

The third factor also relates to the defendant's knowledge. Presence at the time of the tort can be evidence that the defendant knew of the breach. However, more knowledge may be required the further removed from the tort the defendant is in time and distance.[116] Consider *Russell v. Marlboro Books*,[117] in which the court found substantial assistance based on the defendant seller's knowledge that the buyer of a model's picture intended to alter the picture and use it to defame the model.[118] Substantial assistance existed because of the defendant's high level of knowledge.[119]

The defendant's relation to the primary wrongdoer may also be evidence that could overcome a lack of actual knowledge. For example, in *Halberstam v. Welch*, the defendant's relation to the primary wrongdoer furthered the inference that she knew of the wrongdoings of her live-in companion.[120] However, this factor has more often been used to show that the defendant's conduct constituted substantial assistance because he held a position of

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113. *See* Rael v. Cadena, 604 P.2d 822, 823 (N.M. Ct. App. 1979) (finding defendant who did not physically participate but cheered on the assault liable for aiding and abetting).

114. *See* Kuehnle, *supra* note 57, at 322.

115. *See* Woodward v. Metro Bank of Dallas, 522 F.2d 84, 95 (5th Cir. 1975). *See also* Camp v. Dema, 948 F.2d 455, 459 (8th Cir. 1991) ("Knowingly engaging in a customary business transaction which incidentally aids the violation of securities laws, without more, will not lead to liability."); Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (stating that liability based on inaction would require greater showing of intent); Spinner v. Nutt, 631 N.E.2d 542, 546 (Mass. 1994) (noting that giving legal advice, "without more, is insufficient to give rise to a claim that an attorney is responsible to third persons for the fraudulent acts of his clients"); Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 187 (Minn. 1999) (noting that where breach to which assistance is given is not obvious, courts are reluctant to impose liability without proof of actual knowledge and indicating the court's intention, with respect to professionals, to apply the requirements strictly).

116. *See* Halberstam v. Welch, 705 F.2d 472, 488 (D.C. Cir. 1983).

117. 18 Misc. 2d 166 (N.Y. Sup. Ct. 1959).

118. *Id.* at 188.

119. *See id* at 187-88 (finding that defendant rendered substantial assistance since the libel was not only foreseeable to defendant but also known to the defendant).

120. *See Halberstam*, 705 F.2d at 488.

authority in relation to the primary wrongdoer.[121] In these cases, the aiding and abetting typically takes the form of active encouragement.[122]

The fifth factor is the defendant's state of mind. As stated earlier, a strong showing of intent on the part of the defendant will overcome lack of proof of actual knowledge.[123] The potential benefit to the defendant is also relevant in assessing his state of mind.[124] Where the defendant stands to gain from the other's wrongful conduct, it may be easier to assume the requisite knowledge existed.[125] Thus, even if he did little to actually aid the other's tort, he may be held to have provided enough assistance because his acquiescence in the conduct that benefitted him indicates actual knowledge.

Adding the sixth factor of duration of the assistance, the court in *Halberstam* seemed to be merely expanding a discussion of two other factors: the defendant's relation to the wrongdoer and the defendant's state of mind. The court stated that "[t]he length of time an alleged aider-abettor has been involved with a tortfeasor almost certainly affects the quality and extent of their relationship and probably influences the amount of aid provided as well; additionally, it may afford evidence of the defendant's state of mind."[126]

It probably makes little difference whether the duration of assistance is treated as a separate factor or is viewed as a subset of the factors examining the defendant's state of mind and relation to the wrongdoer. The key point of the substantial assistance analysis as an element of the sliding scale approach is that it is fact-specific and provides general guidelines for imposing liability on alleged aiders and abettors.

IV. THE FUTURE OF 876(b) IN SOUTH CAROLINA

A. Choosing a Test

The elements involved in an aiding and abetting tortious conduct claim

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121. *See* Cobb v. Indian Springs, Inc., 522 S.W.2d 383, 387 (Ark. 1975) (finding that security guard's encouragement of boy to test the speed of his car was substantial assistance given his position of authority).

122. *See id.*

123. *See, e.g., Russell*, 18 Misc. 2d at 188 (implying that defendant intended to assist in the defamation).

124. *See* S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 849 (2d Cir. 1987) (refusing to find erroneous a jury charge that indicated that defendant could be liable if it knowingly accepted the benefits of the breach).

125. *See, e.g., Halberstam*, 705 F.2d at 488 (noting that defendant enjoyed the fruits of her live-in companion's nightly burglaries); Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 487, 413 S.E.2d 9, 12 (1991) (finding that defendant stood to benefit from aiding and abetting the abuse of process by virtue of a ten percent interest under an assignment); Lowndes Prod. Inc. v. Brower, 259 S.C. 322, 337-38, 191 S.E.2d 761, 769-70 (1972) (finding that the defendant aider and abettor had not only assisted but also had profited from the primary wrongdoers' breach and thus should be liable for damages caused by that breach).

126. *Halberstam*, 705 F.2d at 484.

have appeared in cases in this country for many years, sometimes specifically applying 876(b), other times without reference to either the first or second Restatement. However, as noted earlier, courts have not been particularly consistent in applying these elements. This Comment, therefore, does not purport to advance a new test, but rather attempts to synthesize the tests employed by different courts into a workable approach that can be used when analyzing any claim of aiding and abetting tortious conduct.

The sliding scale analysis advanced here is hardly new either. The Fifth Circuit first articulated this approach in 1975 when it used 876(b) to define the elements of aiding and abetting a federal securities law violation.[127] Since then, other courts have used it as an explicit test in aiding and abetting tortious conduct claims.[123]

In deciding whether to adopt 876(b), and, if so, how to adopt it, South Carolina courts should give serious consideration to the sliding scale approach. The primary benefit of this approach is the flexibility it allows while still providing guidance as to when liability should attach. A strict rule requiring actual knowledge and barring liability in cases of inaction and silence would inevitably be problematic, as demonstrated by the experience of other courts which have been forced to make exceptions to their stringent rules in order to prevent injustice.

Of course, South Carolina could choose not to articulate any standards for 876(b) liability and, instead, follow a case-by-case approach. However, there is great danger in that path since businesspeople, attorneys, accountants, and other professionals would not be able to judge their potential liability absent case law directly on point. As the Supreme Court has noted, such uncertainty has a detrimental effect on the provision of professional services which can, in turn, create a ripple effect hindering newer and smaller companies that need such advice.[129]

Therefore, South Carolina should embrace 876(b) and set out a test that uses the sliding scale approach. The analysis consists of three basic elements: (1) the primary wrongdoer's tortious conduct causes injury to the plaintiff; (2) the aider and abettor has acted recklessly with respect to knowledge of the conduct or his knowledge can be inferred by the circumstances; and (3) the aider and abettor substantially assists or encourages the wrongdoer in the breach. The knowledge and assistance requirements are evaluated in tandem. The aider and abettor is then liable for all foreseeable injuries flowing from the conduct of the primary wrongdoer, regardless of whether he only specifically aided and abetted part of the conduct. The aiding and abetting need only be a proximate cause of the plaintiff's injuries.

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127. *See* Woodward v. Metro Bank of Dallas, 522 F.2d 84, 97 (5th Cir. 1975).

128. *See In re* TMJ Implants Prod. Liab. Litig., 113 F.3d 1484, 1495 (8th Cir. 1997); Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 188 (Minn. 1999).

129. *See* Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 188 (1994).

B. Other Applications

While it is easy to see that the approach advocated above could readily be applied to cases like the aiding and abetting negligence claim involved in *Pruitt v. Bowers*,[130] there are many other instances in which liability for aiding and abetting could arise. In all instances, the purposes of aider and abettor liability should be clear: (1) fuller compensation for victims; and (2) deterrence of participation in wrongful activities.[131]

In line with these purposes, the doctrine would be useful for supplementing a plaintiff's recovery in securities fraud, as the plaintiff could sue responsible parties for aiding and abetting common law fraud. Claims by defrauded investors would be especially relevant now that both the United States Supreme Court and the South Carolina Supreme Court have effectively closed the door on plaintiffs' implied private rights of action for aiding and abetting statutory violations of securities law.[132]

Additionally, aider and abettor liability may serve to increase deterrence of drunk driving. As the law stands now, friends drinking with drivers have nothing more than a moral incentive to take the keys away from someone clearly too drunk to drive. Imposing liability on one who substantially aids and abets such negligent conduct of another could help to curb drunk driving and diminish the economic impact such conduct has on the state.[133]

V. CONCLUSION

With only a little imagination, practitioners could find numerous other ways in which aider and abettor liability could serve to further the goals of the state's judicial system. Aider and abettor liability under 876(b), tested with a sliding scale approach, could certainly advance these policies. Adopting the

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130. 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998) (allowing plaintiff, who was injured in a car wreck, to go forward with aiding and abetting cause of action against passenger in car driven by drunk driver).

131. *See Central Bank*, 511 U.S. at 188.

132. *See id.* at 191 (holding that no private right of action exists for aiding and abetting suits under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1981)); Atlanta Skin & Cancer Clinic v. Hallmark Gen. Partners, Inc., 320 S.C. 113, 121, 463 S.E.2d 600, 605 (1995) (holding that no implied right of action exists "for aiding and abetting a Securities Act violation outside of the express remedy contained in § 35-1-1500"). This section of the statute limits liability to "(1) a partner, officer, or director of a seller (or person occupying a similar status or performing similar functions), (2) an employee of a seller, (3) a broker-dealer, and (4) an agent." S.C. CODE ANN. § 35-1-1500 (Law. Co-op. Supp. 1999).

133. In 1998, 220 (24%) of the 912 fatal crashes in South Carolina were alcohol-related. Nearly 10% of those killed on South Carolina's roads were involved in an alcohol-related accident. National Highway Traffic Safety Administration (visited Jan. 28, 2000) <http://www.fars.nhtsa.dot.gov>. On a national level, direct costs of alcohol-related crashes are estimated to be $44 billion yearly, including $6 billion in direct medical costs. An additional $90 billion is lost in quality of life due to these crashes. Mothers Against Drunk Driving, *Crash Costs*, (visited Jan. 28, 2000) <http://www.madd.org/stats>.

sliding scale standard and the factors identified in the comment to 876(b) can avoid the confusing and uncertain case law that has marked jurisprudence in this area. As aider and abettor liability law progresses in this state, the courts can further refine the elements and add factors that best suit the state's needs.

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